



Congressman Leonard Lance
7th District, New Jersey

23 Royal Road

Suite 101

Flemington, NJ 08822

Phone: 908-788-6900

Fax: 908-788-2869

www.lance.house.gov

October 12, 2011

TO: Captain John McClean

FAX #: 202-685-6077

FROM: (b) (6)

SUBJECT: Privacy Authorization Form

Please see attached.

24 pages are being transmitted, including this cover sheet.

LEONARD LANCE
SEVENTH DISTRICT, NEW JERSEY

COMMITTEE:
FINANCIAL SERVICES

SUBCOMMITTEES:
FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT

DOMESTIC MONETARY POLICY
AND TECHNOLOGY



Congress of the United States
House of Representatives

114 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
PHONE: 202-225-5351
FAX: 202-225-9460

425 NORTH AVENUE, EAST
WESTFIELD, N.J. 07090
PHONE: 908-518-7733
FAX: 908-518-7751

20 ROYAL ROAD, SUITE 101
FLEMINGTON, N.J. 08822
PHONE: 908-788-6900
FAX: 908-788-2869

October 12, 2011

Captain John McClean
Department of the Navy
B-324 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Captain McClean,

Congressman Lance was recently contacted by a constituent, (b) (6) regarding his desire to obtain back pay for time he served as a DoD Police Officer at Lakehurst Naval Air Station. Mr. (b) (6) has previously contacted our office regarding this issue and a case was filed and closed unfavorably.

I have enclosed a copy of Mr. (b) (6) privacy authorization form, supporting documents and additional documents he has recently provided for your review. I would appreciate any information your office may provide regarding this matter.

Thank you for your assistance. Best wishes.

Sincerely,

(b) (6)

Constituent Services Representative

Enclosures

cc: Mr. (b) (6)

JERSEY CITY OFFICE
35 Journal Square Suite 906
Jersey City, NJ 07036
Phone: 201-222-2828
Fax: 201-222-0188

WASHINGTON, DC OFFICE
1024 Longworth
Washington, D.C. 20515
Phone: 202-225-7919
Fax: 202-226-0792

BAYONNE OFFICE
Bayonne City Hall
630 Avenue C Room 9
Phone: 201-823-2900
Fax: 201-858-7139



WEST NEW YORK OFFICE
5500 Palisade Ave. Suite A
West New York, NJ 07093
Phone: 201-558-0800
Fax: 201-617-2809

CARTERET OFFICE
100 Cooke Ave, 2nd floor
Carteret, NJ 07008
Phone: 732-969-9160
Fax: 732-969-9167

PERTH AMBOY OFFICE
Perth Amboy City Hall
260 High Street 1st floor
Phone: 732-442-0610
Fax: 732-442-0671

Dear Congressman Sires:

In accordance with the Right to Privacy Act of 1974, I understand that my written consent is required before a government agency can release information about me to you or your designated staff member. By completing and signing this document, I hereby permit you or your staff to investigate the situation described below as I have requested.

(b) (6)



See Attached

4-21-11

To: Whom It may Concern,

Around July 2006 I became employed by the United States Navy (Lakehurst Naval Air Station, Lakehurst, New Jersey). My title was a Department of Defense Federal Police officer. When I became employed, I was told that the navy violated the present contract by no longer paying the officers for the half hour getting prepared for the road (gun belts, uniform, etc.) I was told this matter was being handled by the union and was waiting for a decision by the courts. I don't remember when we were all told the court made their decision in favor of the officers, that the navy violated the contract and that each officer was to be paid back pay. This violation started in 2004 and was completed by the courts in 2009. So I was in this situation from July 2006 - 2009. I have never seen any of the back pay and feel that the navy owes me this money. I have made numerous attempts to obtain a copy of the court decision and the contract with no success. There are many police officers besides myself waiting to get our back pay. My LT at the time of this matter was Lt. Lawler 732-323-4000. I would appreciate any help that Congressman Lance can give to get my back pay.

I am a veteran of the Vietnam War, disabled with hearing issues, depression and balance. I also can no longer work due to heart/cheat issues.

Please call me at any time other Thank you for your time

(b) (6)



DEPARTMENT OF THE NAVY
OFFICE OF CIVILIAN HUMAN RESOURCES
614 SICARD STREET SE SUITE 100
WASHINGTON NAVY YARD, D.C. 20374-5072

MAY 18 2011

The Honorable Leonard Lance
Member, United States House
of Representatives
23 Royal Road, Suite 101
Flemington, NJ 08822

Dear Congressman Lance:

Thank you for your letter of May 4, 2011, to the Department of the Navy (DON), Office of Legislative Affairs on behalf of your constituent, Mr. (b) (6) Mr. (b) (6) is a former Police Officer, GS-0083-06, at the Naval Support Activity (NSA), Lakehurst, New Jersey. He requests assistance to determine if he is entitled to back pay as part of the resolution of the unfair labor practice (ULP) charges filed by the National Association of Government Employees Local R2-84 in 2004, and again in 2008.

The ULP was ongoing at the time of Mr. (b) (6) retirement in August 2009, but was resolved in 2010. Under the unique collective bargaining agreement (CBA) at NSA Lakehurst, prior to January 2005 police officers were paid for 8½ hours per day. This included time for weapons issue and turn-in as well as shift instructions and inspections. There was no formal designated lunch break, but covered employees were permitted to eat sometime during the paid 8½-hour-shift, upon approval by the shift supervisor. This was covered in Section 1, Article 34 of the CBA. The CBA separately provided, in Section 2, Article 34 that the basic workweek consisted of 5 consecutive workdays of 8½ hours and that any time over 8 hours was compensated as overtime. In 2004 activity management revoked these provisions as violating Federal labor law. The union responded with two ULPs in 2004 and a grievance in 2008. In each case, the Federal Labor Relations Authority sustained the management position and, as a result, there was no backpay entitlement for any of the police officers involved.

The enclosure provides a timeline of actions and current status of the ULP/grievance regarding overtime pay.

I hope this information is helpful in responding to Mr. (b) (6). Further correspondence on this case should be addressed to me, ATTN: Code 016/pf/550.

Sincerely,

(b) (6)

Director, Assessment and
Workforce Inquiries Division

Enclosure (1)

Chronology of Events

November 2004 NSA Lakehurst informs NAGE Local R2-84 that it will no longer honor Sections 1 and 2 of Article 34 as the language excessively interferes with management's right to assign work.

January 2005 After discussions with the union failed to produce a settlement, management implemented its decision to no longer honor the noted contract provisions.

February 2005 The union filed two unfair labor practice charges with the Federal Labor Relations Authority (FLRA).

April 2005 FLRA Boston dismisses both union charges, determining that the provisions at issue did, in fact, interfere with management's right to assign work.

May 2005 The union appeals the Boston Regional Office decision to Office of General Council (OGC) for FLRA.

December 2005 OGC finds no basis to reverse or demand the Boston Regional Office decision, and the union does not pursue the matter further until 2008.

February 2008 After a change in local leadership, the union files a grievance alleging that management is violating Article 34 Sections 1 and 2; by not paying ½ hour of overtime each day. The grievance is denied through the steps of the grievance procedure, based in part on the fact that the noted provisions had been declared unenforceable by the FLRA over 2 years prior. Nonetheless, the union invokes arbitration.

February 2010 The arbitrator, despite being made aware of the earlier actions by the FLRA, finds that management has been violating Article 24 Sections 1 and 2 since January 2005 and awards back pay.

May 2010 DON files an exception to the award asserting the arbitrator did not have jurisdiction as the matter had already been addressed and resolved by the FLRA in 2005.

July 2010 The FLRA sustained DON's assertions and sets aside the award invalidating any back pay entitlement. The union does not challenge the ruling in the courts.

Enclosure (1)

FEDERAL MEDIATION AND CONCILIATION SERVICES

In The Matter of the Arbitration Between:

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
LOCAL R2-84,

"Union"

-AND-

UNITED STATES NAVY, NAVAIR ENGINEERING CENTER,
LAKEHURST, NEW JERSEY

"Agency" or "Activity"

Grievance: Civilian Police; "Standby" pay
FMCS#: 080515-03052-1

AWARD AND OPINION

Of Arbitrator (b) (6)

APPEARANCES

For the Union:

(b) (6)

For the Employer:

(b) (6)

NAVAIR Engineering Lakehurst - NAGE Local R2-84
FMCS # 080515-03052-1

Contract Grievance: Civilian Police; Standby pay

INTRODUCTION

The underlying dispute arose from a difference of opinion between the parties when the 'Activity' decided to implement certain changes in "the manner of assigning work" to its Civilian Police (Union) force. After informing the Union of its intentions, the following occurred (paraphrased where appropriate; from the Parties' Joint Stipulations):

November 2004: Prior to this, the Activity paid its civilian Police Officers for an eight and one-half (8½) hour shift, which included one-half hour of overtime (premium) pay. Also, these Officers had been permitted to eat "on (the) clock", without a designated lunch break.

During November 2004, after a period of years paying as above, the Activity advised the Union in writing, that "Sections 1 and 2 of Article 34 [of their "C.B.A."] violated management's right to assign work under section 7116(a) of the Federal Labor Relations Statute" (the Statute). Further, management informed the Union that while each work shift would remain at 8½ hours, it would thereafter include "a one-half hour unpaid lunch period and, that the previously paid one-half hour of daily overtime would be eliminated".

23 January 2005: As advised it would, management implemented the change thus eliminating the ½ hour of overtime pay. This grievance is about that loss of 'standby' pay, to date.

February 2005: The Union filed unfair labor practice (ULP) charges (BN-CA-05-0178 and BN-CA-05-0179) alleging that two management officials had repudiated Sections 1 and 2 of Article 34 of the CBA and violated the applicable Office of Personnel Management (OPM) pay regulations when it took the actions noted in Stipulation #7 above.

April 2005: The Boston Regional Office of the Federal Labor Relations Authority (FLRA) dismissed ULP charges BN-CA-05-0178 and BN-CA-05-0179, determining that Article 34, Sections 1 and 2 excessively interfered with management's right to assign work under 7116(a) of the Statute and were, thus, unenforceable.

May 2005: The Union appealed the decision of the Boston Regional Office in cases BN-CA-05-0178 and BN-CA-05-0179 to the Office of General Counsel (OGC), FLRA.

December 2005: The OGC denied the Union's appeal finding no basis to reverse or remand the decision of the Boston Regional Office in cases BN-CA 05-0178 and BN-CA-05-0179.

February 1, 2008: A grievance was filed "labeled Step 3" (Joint Exhibit 3). The grievance alleged that Sections 1 and 2 of Article 34 concerning overtime and unpaid on-call duty had been

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completely ignored. Certain issues regarding Sections 7, 8 and 9 were, ultimately, addressed separately (and thus, not reflected herein).

The grievance was processed through all steps of the Collective Bargaining Agreement (herein "Agreement" or "C.B.A."; Joint Exhibit #2) and was appealed to arbitration. Neither party raised procedural issues in that regard.

October 21, 2008: This Arbitrator was appointed to hear the matter in dispute, but later, after a series of conference calls, the Parties decided that no evidentiary hearing was necessary. In lieu thereof, both sides agreed that a joint submission of facts, including a mutually acknowledged statement of the issue, would be filed (The "Joint Stipulations") to the undersigned neutral Arbitrator. Each side had been afforded full opportunity of a hearing to present written exhibits, sworn testimony, cross-examination and rebuttal, but instead relied only upon written submission of the record; including their respective arguments by briefs.

February 27, 2009: The Parties initially elected this date to close by submission of these "Stipulations", Briefs and cited prior Awards. The record closed on March 4, 2009 upon receipt of those materials, after some dispute between the Parties about filing procedures. Thereafter, an enlargement of the time to file the Award/Opinion was granted, since a "Clarification" of facts was needed. The record was re-opened until that occurred; i.e., was filed.

May 27, 2009: The "Clarifications" were served, and are included (reprinted) hereunder.

Issue: The following question is before this Arbitrator: "Whether the civilian police officers ('Police') employed at the Agency's location (Activity) and represented by the National Association of Government Employees, Local R2-84 (Union), are entitled to "standby" pay or, are, "in an on-call status (i.e., unpaid) during their one-half hour 'unpaid' lunch period"?

BACKGROUND, FACTS and PARTY POSITIONS

Except as noted above (at **Introduction**), the following numbered paragraphs, "as found in joint stipulation dated February 27, 2009", represent the Parties' additional, agreed upon facts:

"1. Navy civilian police officers assigned to the Naval Air Engineering Station, Lakehurst, NJ (the Activity) are represented by Local R2-84 of the National Association of Government Employees. The bargaining unit consists of 27

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employees, including 22 police officers and five (5) dispatchers. (Joint Stipulation #1)

2. The position description for Police Officer, GS-083-06, effective 2/15/2001, Position # LN07349000, is an accurate description of the duties and responsibilities of the represented police officers. [Joint Exhibit 1] (Joint Stipulation #2)

3. The collective bargaining agreement (CBA) between the Activity and the Union expired in November 1998. The terms and conditions of the CBA have not been extended in writing, but have been continued at the mutual agreement of the parties. [Joint Exhibit 2] (Joint Stipulation #3)

4. Article 34 of the CBA sets forth terms and conditions of employment, which are unique to the police at the Activity. (Joint Stipulation #4)

5. Article 34, Section 1, established the hours of work during which the police would be assigned police duties as eight and one-half hours per day and identified certain functions that would be included as Police duties. Section 1 further set forth that there would be no designated lunch break and that the police would be permitted to eat lunch on the clock. (Joint Stipulation #5)

6. Article 34, Section 2, in conjunction with section 1, established a basic workweek of five consecutive workdays of eight and one-half hours and provided that any time over eight hours in a day would be compensated as overtime. (Joint Stipulation #6)

[Joint Stipulation Numbers 7-11 are included above in the Introduction by date.]

12. Article 34 contains no police-specific language addressing stand-by or on-call time. (Joint Stipulation #12)

13. Article 12, Section 12 of the CBA, Overtime, states that stand-by time is defined in 5 C.F.R. 550 and 551 and that employees shall be compensated in accordance with said regulations when required to perform stand-by duties. Article 13, Section 2.c allows the Union to grieve alleged violations of the CBA or any laws, rules or regulations affecting conditions of employment. (Joint Stipulation #13)

[Joint Stipulation Number 14 is stated in the Introduction; 1 February 2008 (Joint Exhibit #3)]

15. A handwritten addendum to the 1 February 2008 grievance filing requested that management cease and desist from its violative behavior as remedy. [Joint Exhibit 4] (Joint Stipulation #15)

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16. On 3 April 2008, management issued a memorandum (to be considered the step 2 grievance decision) denying the Union's grievance. In summary, the decision found that the facts did not support a claim that the assigned lunch period constituted hours of work and should, thus, be compensable. [Joint Exhibit 5] (Joint Stipulation #16)
17. On 10 April 2008, the Union filed another grievance, also labeled step 3, this time to Captain P. Beachy, the base Commanding Officer. [Joint Exhibit 6]. This grievance referenced the OPM pay regulations regarding standby and on-call time, the Step 2 grievance decision and an email exchange between a representative of the union and a management representative. There is no record that a Step 3 grievance meeting was ever held or a written step 3 grievance decision issued. (Joint Stipulation #17)
18. As no Step 3 grievance decision was issued by the Activity on 28 April 2008, the Union delivered a demand to arbitrate to Captain P. Beachy, Commanding Officer of the Naval Air engineering Center, Lakehurst, NJ. [Joint Exhibit 7] (Joint Stipulation #18)
19. The civilian police at the Activity are classified as non-exempt employees and, therefore, covered by the provisions of the Fair Labor Standards Act. (Joint Stipulation #19)
20. The regulations applicable to the issue of stand-by pay can be found at 5 C.F.R. 551, Pay Administration under the Fair Labor Standards Act—more specifically, 5 C.F.R. 551.431 Time Spent on Standby Duty or in an On-Call Status. (Joint Stipulation #20)
- * NOTE: [Subsequent "Clarifications" pointed out and thus confirmed that the phrase, "established practice" (Stipulations 21 – 26) refers to the time period after November, 2004] *
21. It is Management's established practice to require that police officers take an unpaid one-half hour lunch period. (Joint Stipulation #21)
22. It is Management's established practice to require that police officers remain in uniform and retain custody of all issued equipment, including their duty weapon, during the unpaid one-half hour lunch period.
23. It is Management's established practice to require that police officers monitor their radio during the one-half hour unpaid lunch period.
24. It is Management's established practice to restrict police officers to the naval base during the unpaid one-half hour lunch period.

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25. It is Management's established practice to relieve police officers of their assigned duty for a 30 minute lunch period. Police officers may eat lunch at any of the on-base food/eating establishments or otherwise use the time in any way, at their discretion, while remaining within the confines of the naval base.

26. It is Management's established practice to assign police officers to one of three daily shifts. Those shifts run from 6:30 am to 3:00 pm; 2:30 pm to 11:00 pm and 10:30 pm to 7:00 am.

27. There are two eating establishments on the Activity: the All American Grill, open from 6:00 am to 2:00 pm Monday through Friday and the Cyber Café, open from 6:30 am to 1:00 pm, also Monday through Friday.

28. Other services available on base include the Lakehurst Naval Federal Credit Union, open from 8:30 am to 3:30 pm, Monday through Friday; the Post Exchange (PX), which includes a dry cleaners and is open from 10:00 am to 5:00 pm Tuesday through Sunday. The PX is only available to active duty or retired military personnel and their families. Only two of the covered Police Officers have these privileges.

29. Police at the Activity are subject to recall to duty by management during the one-half hour unpaid lunch period in the event of an emergency or other emergent event warranting such recall.

30. Police at the Activity are entitled to appropriate compensation for any duty time resulting from recall during the unpaid lunch period, in accordance with applicable regulations governing premium pay."

[Joint Stipulation; Arbitrator's Exhibit #1, emphasis added]

Clarification was sought by the Arbitrator over the meaning and intention of certain language contained in the Joint Stipulations.

May 27, 2009: The Parties had jointly crafted and thereafter emailed:

"Sent: Wednesday, May 27, 2009 5:52 PM

Subject: ARBITRATOR REQUESTED CLARIFICATIONS

A. In an effort to clarify the fact-based implications associated with Stipulation 5, the parties offer and agree on the following:

---Prior to November 2004, there was no separate, designated lunch break of any specific duration for police officers. Meals were taken sometime during the paid 8 1/2 work shift at a time determined appropriate by the officer and the shift supervisor.

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B. In an effort to clarify the fact-based implications associated with Stipulations 7 and 21, the parties offer and agree on the following:

—Post November 2004 an unpaid one-half hour lunch break was provided to police officers. The manner of application differed by shift assignment as follows:

First shift: A specific time-designated "Lunch" window of 120 minutes is built into the scheduling grid from 11:00 AM to 1:00 PM. Each first shift officer is assigned a specific designated 30-minute lunch break within said window, e.g., 11:00 to 11:30; 11:30 to 12:00, etc.

Second/third shift: No designated "Lunch" window is built into the scheduling grid. Officers are NOT assigned a specific designated 30-minute lunch break, but must take their lunch break as opportunity and the shift supervisor permit.

Other requested info:

- Base area = 3700 acres
- Minimum 4 bargaining unit police officers assigned to each shift
- Expected response time to calls is 3-5 minutes
- Response to recalls from lunch break expected to be immediate unless specific response time identified by shift supervisor/dispatcher."

The above "Clarification" was sought after full review of the record; especially in the absence of testimonial evidence, typically produced at a traditional evidentiary hearing.

In summary of the Union's Position: It argues two provisions of the C.B.A. allow it to grieve this matter; that Article 12, Section 12 [CBA] requires that "employees be compensated in accordance with 5 CFR §§550 and 551". Also, that Article 13, Section 2.c, permits a grievance for "violations of laws, rules or regulations affecting conditions of employment". The Union contends that management's failure to compensate Police for their meal periods violates the FLSA and applicable regulations, thereby breaching C.B.A., Article 12 and thus giving rise to a grievance under Article 13.

In furtherance of the above, it points to the Federal government's administration of standby pay, under the FLSA, being addressed at 5 CFR, §551.431(a)(1); stating:

"(a)(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to

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perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications."

[Union Brief; bold, added for emphasis]

The Union contends that Police Officers serve on the naval base twenty four hours a day, seven days a week, "on one of three shifts that include evenings and weekends". Further, that Activity managers set both "the time of any given Officer's meal period, and require that the Officer remain on the base during that period. The Officer's meal periods may fall at a variety of times during the day or night due to staffing and security requirements, as assigned". These facts, maintains the Union, correspond to the standby duty description found in 5 CFR §551.431 of employees that are "restricted by official order to a designated duty post for work-related purposes". This means, for the purposes of this argument, that they should continue receiving premium pay. Emphatically, argues the Union, "the working condition that led to such pay in the first instance, has never changed nor been altered."

Additional indications offered by the Union to support the need for such pay are that Agency managers require Police Officers to stay in their uniforms, retain their equipment and monitor their radios during their meal periods. Officers are also required to respond to any calls they might receive over their radios. [Joint Exhibit 5, at 3.e, "The officer is subject to recall to duty by management in the event of any emergency or other emergent circumstance(s) warranting recall to duty."] These facts, argue the Union, show that the officers are required to remain in a state of readiness to perform work, further justifying a finding that the police officers are on standby duty, requiring premium pay.

Despite the agency's view to the contrary, the Union claims it is not sufficient that Police are allowed to eat at on-base establishments or, relieved of their assigned duties (while eating). It argues instead that Police officers cannot purchase food on the base during most of their meal periods, citing the All American Grill and Cyber Café, open only during 40 hours of the week, leaving over 120 hours each week during which no eating establishments are open on the base.

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Thus, the Union maintains that the Officers must bring their own food onto the base prior to their shifts if they want to eat during these times, since they are not permitted to leave.

Other facts reinforce the Officer's claims for this compensation and the Union points out that no grocery stores or dry cleaners are available for the vast majority of the Police force. Only one bank is available and the Base's one convenience store (the Cyber Café) is open for only a limited time during the regular work week. These limited facilities do not allow police officers to attend to their own affairs during their meal periods, argues the Union.

Thus, the Union contends that Management has imposed limitations on its Officers which do not allow them effective use of their meal periods, i.e. for their own purposes. They contend that since the Police are restricted to their duty station [Lakehurst Naval Base] during the meal period they are thus denied sufficient freedom of movement to attend to their own business. The limited facilities on the naval base do not allow the police officers to attend to their affairs while restricted to their duty station. These facts, argues the Union, justify a finding that Activity Police Officers are entitled to payment for their meal periods from November 2004 to the present. [See AFGE, Local 22, supra.]

Accordingly, the Union contends that since Management imposed these restrictions, i.e., dictating how these Officers get to spend their ½ hour meal period, these facts justify them receiving compensation since they are, in effect, on standby duty during those time periods. Therefore, as remedy, "The Union seeks a decision:

- 1) Finding that the Agency's actions violated the CBA, Article 12, the FLSA, and the applicable regulations.
- 2) Finding that the Agency's actions resulted in a loss of pay and benefits to the Agency police and that without those actions, the police would not have suffered said loss.
- 3) Awarding back pay under the Back Pay Act, with interest, from November 2004 to the present.
- 4) Ordering the Agency to pay the police overtime for future meal periods in accordance with the FLSA, and the applicable laws and regulations.
- 5) Awarding the Union attorney's fees and costs under the Back Pay Act in the amount of \$7,500.00; also asking that the Arbitrator retain jurisdiction for purposes of enforcement of his decision."

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For the above reasons, argues the Union, this grievance should be decided in the Union's favor, granting all relief requested, including the attorney's fees and costs. "The Union requests a decision granting the full relief requested within 30 days."

In summary of the Employer's position: It argues that the Stipulations acknowledge, "...that until November 2004 the Activity paid its police officers for an eight and one-half hour shift, per day, which included one-half hour of overtime pay." Further, that there was no, 'designated lunch break' and Officers were permitted to consume a meal, "on the clock".

Employer argues that in November 2004, management notified the Union and the police officers that, "it had decided to eliminate the daily, paid one-half hour of overtime", built into the police officer's daily schedule per Sections 1 and 2 of Article 34 of the collective bargaining agreement. Management also contends it had notified the Union that the daily work schedule would remain at eight and one-half hours but, "that a half hour of same would now be set aside for an unpaid lunch period". (Employer Brief and, Joint Stipulation # 7)

The Activity maintains that, "the basis for these changes was management's contention that the contractual requirements mandating 'the daily, paid one-half hour of overtime', as set forth in the Parties collective bargaining Agreement ["C.B.A."; Sections 1 and 2 of Article 34] directly interfered with management's right to assign work". The Activity still relies upon the authority granted to it under the F.L.B. Statute Section 7116(a).

In essence therefore, the Agency asserts that neither 'stand-by' nor 'on-call' status is appropriate for this ½ hour time period. It points to arbitral authority presented to demonstrate that other Federal activities/Agencies treat their work force in similar fashion, i.e. only paying premium rates when and if an employee is called upon to perform an actual function of their duties.

In its filed brief the Activity relies substantially upon the notion that its 'management rights' were being interfered with by, "the prior practice of paying for the ½ hour of overtime." Further, the Agency points to 5 CFR-551.431 (a) (1) and (2), especially the third criteria, wherein it maintains that its Officers fail to qualify for "standby status" since it denies they "are subject to limitations so substantial", as to be unable to effectively use the lunch break for their own purposes. While it acknowledges that it's Officers, "certainly meet the first two criteria"; it

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points to the third in support of facts it maintains do not "subject these Officers to limitations so substantial as to be unable to effectively use the lunch break for their own purposes" [use of, 'on-base eating establishments'; 'eat a lunch...brought from home'; 'use the time as they see fit as long as they are ready to respond to a call'; 'visit the federal credit union, if they are members'; 'if they are eligible...use the Base Military Exchange'

It argues that 5CFR 551.431 (a) (2) supports its view that, "...substantially limiting finding may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities...". It maintains that in the instant case, such things as confinement to the base; remaining in uniform; remaining in possession of the duty firearm; and monitoring the radio are examples of such restrictions. Case or claim decisions made by the Comptroller General/Government Accountability Office repeatedly find that a "restrictions to duty site during an unpaid lunch period" do not necessarily qualify said time for standby overtime pay. [B-198387, Matter of Frank McGuffin] The Activity also argued that, "In a case similar to the instant case, police officers at the Frankford Arsenal were assigned a 30 minute unpaid lunch period within each 8 and one-half hour work shift. The Arsenal's policy prohibited the officers from leaving the facility for lunch, but they were free to have lunch anywhere within the bounds of the Arsenal's facility. Police officers were required to call into headquarters to inform the supervisor of their lunch break and the lunch break was subject to interruption in the event of an emergency. The plaintiffs argued that the lunch periods were not really "free time" since they were subject to recall in the event of an emergency and that they were thus entitled to ½ hour additional compensation for each work shift. The Court found that restrictions to the Arsenal during the lunch break did not result in an automatic entitlement to standby pay and that only evidence that substantial official duties were performed during the lunch break would make compensation available for the 30 minute lunch break. Walter E. Bantom Jr. v. United States 165 Ct. Cl. 312.

Lastly, the Activity argues that this Police force does not qualify to be in an "on-call" status since they are not "off-duty", as that criteria demands. It points to several arbitral authorities for the proposition that the present case excludes 'on-call' employees being paid for this time; a fact not in dispute by the Union here.

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FMCS # 080515-03052-1

Contract Grievance; Civilian Police; Standby pay

In its summation of argument, the Agency argues that, "the police officers in the instant case are not in a standby status when they take their lunch break and, accordingly, overtime premium pay is not due. Neither are they in an on call status, but even if they were premium pay is precluded by the law for someone in an on call status. Finally, the fact that the only remedy specifically sought throughout this grievance was that management cease and desist from violating two contract provisions, found unenforceable by the FLRA prior to the submission of the grievance, strongly suggests that police officers at Lakehurst have suffered no significant hardship and that the grievance is without substance or merit. The Activity contends the grievance is without substance or merit and should be denied.

FINDINGS AND OPINION

I have carefully reviewed all of the evidence presented, including all documents and my notes of conference calls, taking into account the positions taken, stipulations, clarifications and arguments advanced by both parties. The relevant portions of the Agreement between the parties (expired November 8, 1998) are reproduced in pertinent part, as follows:

"Article 7 Overtime

Section 12. Standby time is defined in 5 CFR 550 and 551. Employees shall be compensated in accordance with these regulations when required to perform standby duties.

Article 12. Section 12 of the collective bargaining agreement (CBA) between the Union and the Agency states that employees shall be compensated in accordance with 5 CFR §§550 and 551. Article 13, Section 2.c of the CBA allows the Union to grieve any violation of laws, rules or regulations affecting conditions of employment.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §201, *et seq.*, governs compensation of federal employees. Federal administration of standby pay under the FLSA is addressed at 5 CFR, §551.431(a)(1). This section states:

(a)(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an

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employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

Article 34 Police Officers

Section 15. Overtime. Generally, the employer agrees to give employees 24 hours advance notice when overtime is required unless the employer is prevented from doing so by reason of urgent or unforeseen circumstances. The employer will consider a substitute employee for an overtime assignment if the substitute is identified by the requestor, available for the overtime assignment, willing to work, and qualified for the work assignment. The assignment of overtime will be accomplished as outlined in the SOP covering overtime. The overtime roster will be retained in the Lieutenant's office for anyone to review."

[Joint Exhibit # 1]

Federal Labor Relations Statute (the Statute); Section 7116(a)

ANALYSIS:

The facts are unambiguous on several major points, and only partly in contention here. Clear evidence shows a history of the Agency (at this Activity) paying its civilian Police Officers for working through their meal period and clearly beyond their 8 hour shift, for a total of 8 ½ hours. That extra one half hour of time was compensated at premium pay [1-1/2].

Evidence shows that the facts of that practice did not change for a number of years. Indeed all indicators show that the Parties bargained for premium pay to the Police Officers in exchange for working that ½ hour, i.e., in effect being on "standby" for the entire shift.

In exchange for that premium pay, the limitations placed upon this uniformed Police force were significant. This especially when compared to examples given by the Agency for "other" workforce (non-police) employees shown to allegedly be similarly situated but not entitled to "premium pay". The distinctions between the facts here and those of the cited cases provided and examined, are substantial and apparent. Even the 'Arsenal' case discussed by the Activity here did not contain the same identical factual circumstances found in this case. Further, simply reading the facts of that prior decision and abstractly attempting to compare them, only to

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stipulated facts in this case does not make for clear comparison. Without testimony in this case, at the assertion of the Parties here that none was needed, the lack of clear comparative evidence between the two factual scenarios cannot make the case for the Activity here.

The facts are clear here, that Management allowed little or no latitude to its uniformed Officers when it implemented the change. Due to the limited nature of on-base facilities — even more so by the restricted availability of those facilities to typical business hours (daytime Mon-Fri) the Police Officers here, were effectively on duty during the time factors under consideration. What is even more revealing is that the Activity here acknowledges that access to certain facilities (credit union, Base Exchange, eating establishments) were not an accessible privilege to all Police Officers, and certainly not beyond first shift. None of the prior cases/decisions cited by the Activity herein and argued to be controlling over these facts, proved conclusive. The distinction in this case is clear: in the case before us, management controls the time taken for the meal periods in question. The Police Officers under these controlling factors have little or no latitude to enjoy their 'meal period' in the normal, ordinary sense of such a common practice.

In addition [post November 2004] none of the facts surrounding these Police Officer duties at this facility were altered by Management's decision, "to eliminate the daily, pay one-half hour of overtime". Thus, the Activity's argument that the prior premium pay arrangement (for the ½ hour of overtime) had somehow "interfered with management's right to assign work", fails for at least one and likely two insufficient reasons. The best evidence to support the Union's contention these Police Officers were "on standby" is the simple fact that Management's claim of "interference" with right to assign work is disingenuous on its face. Management had the unfettered right, both before November 2004 and at all times thereafter, to control the movements, activities and all other indicia of its Police force, at any and all times during an Officer's 8½ hour shift.

The constraints imposed on these Officers far outweighed any managerial perception of the alleged "freedom" they had, i.e., to spend a half hour break as they wished. The restrictions of their duty station, unavailability of facilities, need for response measured in multiples of minutes (3 — 5), literally being in-radio contact all the time...cannot be construed as anything but either "on-duty" or, at the very least, on "standby-by" duty. These limitations, under the specific

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fact patterns here, certainly conform to the CFR Regulations cited by the Parties jointly and which call for standby pay under the circumstances found here...

Burden of Proof:

The Union has it here and did establish by clear evidence that the C.B.A. was violated by Employers actions. The Union pointed to Article 12, Section 12 of the contract which requires compliance by the Employer-Activity to ensure that bargaining unit members "be compensated (pursuant to) in accordance with 5 CFR 550 and 551". By extension, Article 13 Sect 2.C of the CBA allows the Union to grieve alleged Management failures to compensate (Police Officers) for meal periods if the act of doing so violates the Fair Labor Standards Act and other applicable regulations.

* Thus, the initial burden of proof has been met, especially since the Agency does not protest the right to bring the claim. [i.e.; no procedural / arbitrability questions were raised, hence this decision does not address any of the prior procedural aspects raised in the Parties' Joint Stipulations] Without a procedural argument, the Agency then accepts as its burden to establish why it believes that the premium pay was not due to these employees. That burden was not clearly enunciated and therefore, not met. *

The Agency was within its authority to deal with these Officers without regard to allowance for personal freedom on personal time; however, in doing so, there was also a need to pay them accordingly. These are civilians and, not being in the military are entitled to be taken care of accordingly. The Union established that right of payment, by meeting its burden of proof.

Standby Pay Criteria:

As cited above, the Federal Government's administration of standby pay must be adhered to, consistent with the C.F.R. regulations discussed above. The analysis above contemplated this.

Management Rights:

To use the phrase "Management Rights" in suggesting that the prior practice somehow interfered with them begs the simple question... "how"? Even the "Clarification" of "Stipulations" jointly offered post-presentation sheds no additional light on the level of control which management either lost or benefited from, over the ½ hour meal break.

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Management did not explain nor even explore how its rights were interfered with, i.e., did not explain how the continuation of a long standing practice (to pay for a ½ hour meal period) would interfere with "its manner of assigning" work. It appears to be a cost saving technique; and, addressed herein is not within the province of an arbitrator, under these circumstances.

While not controlling in an absolute fashion, management's "interference" argument also fails in that there was no evidence presented to show that the Parties' prior practices in this regard hampered the mission of the Agency in any way, shape or form. While left unstated, the apparent goal for the November 2004 change can only be inferred as a cost-saving measure. Such a goal by one party to a collective bargaining agreement is not within the domain of an arbitrator and instead, must be bargained for and only attained as a result of negotiations.

In summary format, the Union had the burden of proof and showed by clear evidence that the C.B.A. had been violated. That evidence shifted the burden for the Employer to show that some other, perhaps militating factors could effectively intervene or supersede the otherwise clear proof of the C.B.A.'s violation by the Activity. Instead, the evidence demonstrated that simply changing a long-standing method of compensating its Police force by an authoritatively sounding and yet arbitrary command, could not be unilaterally accomplished under existing law.

Those laws and regulations (including cited cases, etc.) which both sides referred to have some but, largely minimal impact here. The closest case cited ("W.E. Bantom, Jr.- Frankford Arsenal") by the Activity here lacks comparable facts to the instant case; which describes much more severe restrictions on the freedom to enjoy a set aside lunch period by the Lakehurst facility's Police force. Neither the stipulated facts nor clarifications here demonstrate, as distinguished from "Frankford Arsenal", that the, "... policemen on his shift obtained relief from their posts so that they could have a 30-minute lunch period". The lack of freedom to do so here was especially true for the 2nd and 3rd shift Officers. That distinction, along with others discussed above, support the Union's position that the affected Police Officers are entitled to the ½ hour of premium pay in dispute here.

Without clearer evidence to the contrary here (the absence of testimonial evidence), the stipulated facts and clarifications infer that the status of these Officer's during the entirety of their shift (especially the 2nd and 3rd) is that of being in a constant state of readiness; always on-duty, whether 'standing-by', or responding to a call. Due to the requirements of remaining within the base perimeter, this merely increases the burden upon the individual's freedom to enjoy a meal break, to

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rest, recreate or perform personal tasks. It is therefore conclusive that such Officers are on-duty, on-station during the entirety of their 8 ½ hour shift, and must be paid accordingly.

The remedies sought by the Union were clearly enunciated in most respects, except in one regard. That one aspect had to do with its claim for 'attorney's fees. While the authority to award such a claim is reasonably based, there was an absence of evidence to suggest "why" it should be awarded under the facts in this case. While that factor is not totally dispositive for omitting such fees in this case, there is concern that to award something without appropriate justification would be erroneous. In the absence of an evidentiary hearing as disclosed above, some evidentiary lapses can, and likely will occur. The absence of argument, evidence or proof to support the Union's position or claim for attorney's fees left unspoken a rational or clear basis to award that remedy.

In addition to the above analysis, it is noteworthy to reinforce that such compensated time, at the premium rate has been the established practice between these Parties for an unspecified period of years as a result of their collective bargaining process. The C.B.A. between them requires the continuation of same. Any change to that practice must be attained at the bargaining table and cannot simply be awarded at arbitration by the unilateral request of one side.

My Award follows.